MOTION FILED

APR 19 1999

(3)

No. 98-1501

In the

Supreme Court of the United States

March Term, 1999

THE CONLON GROUP, INC., *Petitioner,*

v.

THE CITY OF ST. LOUIS, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri

MOTION OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. FOR LEAVE TO FILE AS *AMICUS CURIAE* AND BRIEF FOR THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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No. 98-1510

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THE CONLON GROUP, INC., *Petitioner,*

v.

THE CITY OF ST. LOUIS, *Respondent.*

MOTION OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, the International Council of Shopping Centers, Inc. (ICSC) hereby respectfully moves for leave to file the attached brief as *amicus curiae* in this case in support of the petition for a writ of certiorari. The consent of the attorneys for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

1. ICSC is the trade association for the shopping center industry worldwide. ICSC's members own and/or manage nearly every shopping center in the United States. In 1998, this segment of the U.S. economy generated 51% of all nonautomotive sales, and employed 8% of total nonagricultural employment in this country. Neither party to this action is a member of ICSC.

2. ICSC seeks leave to file this brief because it is concerned about the devastating impact the decision below will have on the shopping center industry. The Missouri Court of Appeals held that merely by entering into an agreement with respondent -- pursuant to which petitioner would have to secure governmental approvals for any subsequent changes to the property -- petitioner waived its Fifth Amendment right to just compensation. ICSC members regularly enter into redevelopment agreements like the one executed in this case. Furthermore, just as with petitioner in this case, every shopping center in this country must regularly seek government permits and approvals for the development, operation and alteration of its property.

3. The decision below is troublesome to ICSC because it undermines the Fifth Amendment jurisprudence of this Court -- the constitutional assumptions upon which developers (and their lenders) rely when deciding whether or not to invest in a given project. If the decision is allowed to stand, it will cause enormous turmoil in the shopping center industry, particularly in urban areas that are being redeveloped with public/private partnerships. ICSC's role as representative of these developers makes it uniquely qualified to describe this potential impact to the Court.

Wherefore, for the foregoing reasons, ICSC respectfully asks that this motion be granted.

Respectfully submitted,

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No. 98-1510

IN THE SUPREME COURT OF THE UNITED STATES

THE CONLON GROUP, INC., *Petitioner,*

v.

THE CITY OF ST. LOUIS, *Respondent.*

BRIEF OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1/]

INTEREST OF *AMICUS CURIAE*

The International Council of Shopping Centers, Inc. ("ICSC"), an Illinois not-for-profit corporation, is the trade association for the shopping center industry. ICSC has over 38,000 members worldwide and about 34,000 members in the United States. These members include owners, lenders, retailers and all others having a professional interest in the shopping center industry. ICSC members own and/or manage virtually all of the 43,600 shopping centers in the United States.

1/ Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, ICSC states that its counsel are the sole authors of this brief, and that counsel for neither party to the case authored any part hereof. Further, ICSC states that it alone has made the monetary contributions necessary to prepare and submit this brief.

In 1998, these centers generated $1,044.6 billion in retail sales, constituting 51% of all nonautomotive U.S. sales, and employed 10,351,200 individuals, constituting 8% of all nonagricultural employment in this country.

ICSC members regularly enter into the same type of redevelopment agreement that was executed in this case. Indeed, this type of development activity has become very popular in recent years, and increasingly shopping center owners -- as well as city managers -- have come to rely on it. Furthermore, just as with petitioner in this case, every shopping center in this country must regularly seek government permits and approvals for the development, operation and alteration of its property.

STATEMENT OF THE CASE[2/]

Petitioner purchased two old, vacant buildings in downtown St. Louis, Missouri from the Federal Deposit Insurance Corporation. Subsequent to the purchase, petitioner entered into a redevelopment agreement with the Land Clearance for Redevelopment Authority, an agent of respondent, pursuant to which petitioner would receive certain tax benefits in return for agreeing to use the property in a manner consistent with the agreement. An ordinance of the City of St. Louis that was incorporated by reference into the agreement required any "substantial change" to the original

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2/ ICSC is providing this brief summary of the case for the convenience of the Court. For a more detailed statement, *see* Pet. for Cert. 3, or the decision below, *Conlon Group, Inc. v. City of St. Louis*, 980 S.W.2d 37 (Mo. Ct. App. 1998) (*reprinted at* Pet. App. 3a).

redevelopment plan (approved by the City prior to the execution of the agreement) to be submitted to the relevant organs of respondent for approval in the same manner as the original plan.

After petitioner began to implement its plan for the property, it became apparent that the buildings were structurally unsound, and that the property would not be able to be developed without first "gutting" both buildings. After considering its options, petitioner decided instead to demolish the buildings and build a new structure on the land. Consistent with its obligations under the agreement, petitioner submitted this amended plan to respondent's authorities, who approved the revised project. However, another agent of respondent, the Heritage and Urban Design Commission refused to issue a demolition permit to petitioner.

After pursuing unsuccessful administrative appeals, petitioner initiated an inverse condemnation action against respondent, alleging that denial of the demolition permit constituted a taking in violation of the United States and Missouri constitutions. Finding that there was no economically viable use for petitioner's property unless the buildings were demolished, the trial court ruled that denial of the permit effected a taking, and awarded petitioner $4,259,387 as just compensation therefor. Pet. App. 21a-22a.

The Missouri Court of Appeals reversed the judgment of the trial court, holding that petitioner waived any rights it had in the subject property when it entered into the redevelopment agreement with respondent. Pet. App. 9a-10a. Petitioner's subsequent motion for rehearing was denied by the

Court of Appeals, *see* Pet. App. 2a, and its motion for transfer was denied by the Missouri Supreme Court. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the decision below places in jeopardy the well-established constitutional guarantees of the just compensation clause of the Fifth Amendment. Rather than reiterate the cogent and persuasive legal arguments made by the Conlon Group in its petition, ICSC would like to describe for the Court the potentially disastrous effect the erroneous decision below will have on the shopping center industry. In so doing, ICSC will describe why the issue presented by this case needs to be reviewed by the Court, and why it is essential that the review occur now, with this case.

It is widely recognized as true that American cities are in desperate need of revitalization and a means for enhancing their respective tax bases. *See, e.g.*, *Buying Power of Inner Cities Is Overlooked*, Wall St. J., June 12, 1998, at B9. Perhaps more than any other industry, shopping centers have responded to this crisis. *See* John McCloud, *What City Hall Will Do for Retail*, Shopping Center World, April 1998, at 90 ("Every day, week after week, month after month, city governments throughout the United States are making deals with developers and retailers to encourage them to locate in their towns."). Urban redevelopment and public/private development partnerships are the major new thrust of the shopping center industry, *see* Anna Robaton, *Urban Retailing Renaissance Heats Up Across the Country*, Shopping Centers Today, June 1996, at 1, and the results have been dramatic. *See* McCloud, *What City Hall Will Do for Retail*, at 90-95 (detailing

successful new developments in San Mateo, CA, Syracuse, NY, Portland, OR, Reno, NV, New York, NY and Fremont, CA); *see also* Rachelle Garbarine, *A Shopping Center for a Neglected Ironbound Site*, N.Y. Times, Mar. 26, 1995, at N.J.R.9 (discussing successful new development in Newark, NJ).

Just as with the underlying facts of this case, shopping center redevelopment projects typically involve a developer who agrees to purchase blighted properties pursuant to redevelopment agreements like the one executed by petitioner. As the Court of Appeals pointed out, cities often use tax abatements to entice developers to enter into the agreement. However, even with this type of tax benefit, urban redevelopment is viewed skeptically by developers because redeveloping is more expensive and less predictable than new development. Nevertheless, significant numbers of developers have been willing to assume these risks -- and the extra costs that can follow them -- based on the assumption that they will be able to develop the land in economically beneficial ways, and with the confidence that the Fifth Amendment of the U.S. Constitution will protect against any subsequent takings of the property. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 385-91 (1994) (city may not condition grant of permit on property owner's adherence to requirements that are not related to impact of proposed development); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (land use restrictions, imposed subsequent to property owner acquiring subject property, that deny owner economically viable use of property constitute a taking); and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (regulations that mandate physical invasion of property -- no matter how minute the intrusion -- constitute a taking).

The decision below, if allowed to stand, will fundamentally change this equation. Despite the fact that the development agreement between petitioner and respondent's agent contains no language purporting to waive petitioner's Fifth Amendment rights, the Court of Appeals held that the mere fact that petitioner entered into the agreement was enough to constitute a waiver of petitioner's right to just compensation, and thereby to deny petitioner and others like it the protection of cases like *Dolan*, *Lucas* and *Loretto*: "When [petitioner] entered into the Redevelopment Agreement, it voluntarily gave up full control of its property rights." Pet. App. 9a (*citing State ex rel. Washington Ave. Redevelopment Corp. v. City of St. Louis*, 906 S.W.2d 808, 811 (Mo. App. 1995).[3/] Although the Court of Appeals placed great reliance on the fact that petitioner agreed in the agreement to submit any changes to respondent's respective authorities for approval, Pet. App. 9a-10a, this was nothing more than a codification of regulations that would have governed petitioner's activities whether they were included in the agreement or not. *See* City of St. Louis Ordinance #61366, *as amended* by Board of Aldermen on 6/9/89 (requiring anyone who seeks to demolish a structure within the City of St. Louis to obtain a permit from the City therefor).

[3/] It should be noted that the decision in *Washington Ave. Redevelopment Corp.* plainly does not support the Court of Appeals' holding. Instead, that court merely interpreted the effect of an amendment executed by parties to a development plan that explicitly reassigned certain rights and control issues. *Washington Ave. Redevelopment Corp.*, 908 S.W.2d at 810-11. The decision does not involve the Fifth Amendment in any way, and certainly does not hold that a developer forfeits its Fifth Amendment protections just by signing a redevelopment agreement.

Indeed, developers of commercial property must seek and obtain permits and approvals for all facets of their projects, including architectural and engineering design, fire safety, building code compliance, and construction/demolition. ICSC shares the concern expressed by petitioners that the decision below may motivate city attorneys to secure explicit waivers from applicants in return for these types of permits. *See* Pet. for Cert. 13. If a government can legally extort Fifth Amendment waivers from developers in return for these approvals, the protections of the Fifth Amendment are illusory. This is not consistent with this Court's jurisprudence. *See, e.g., Dolan*, 512 U.S. at 2317 ("the government may not require a person to give up a constitutional right -- here the right to receive just compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."). Therefore, at a minimum, this Court should articulate the standards under which the Fifth Amendment right to just compensation may be waived.

ICSC is unaware of any other decision which holds that developers waive their Fifth Amendment rights simply by executing a redevelopment agreement. Nevertheless, in an industry that is heavily dependent on the essential guarantee of the takings clause, one case from a state appellate court will be enough to change the way the industry does business. It is true that, if the holding below stands, only the rights and investments of developers who are already parties to redevelopment agreements in Missouri -- many of them ICSC members -- will be at immediate risk. However, there can be little doubt that, prospectively, this decision will cause lenders to reconsider financing public/private partnerships, and will force shopping center developers to avoid the urban areas that

need their investments most, opting instead for undeveloped land outside of city boundaries and thereby prolonging urban blight.

CONCLUSION

For the reasons stated, *amicus curiae* ICSC requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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